

1989

In the Matter of the Estate of Walter F. Wolfinger v. : Brief of Appellant

Utah Court of Appeals

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Appellant.

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UTAH COURT OF APPEALS
BRIEF

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IN THE UTAH COURT OF APPEALS

In the Matter of the Estate of
WALTER F. WOLFINGER,
Deceased.

)
)
) Case No. 890323-CA
)
) Priority No. 14b
)
)

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE
FIFTH JUDICIAL DISTRICT COURT IN AND FOR IRON COUNTY
STATE OF UTAH

THE HONORABLE JUDGE J. PHILIP EVES

DEPOSITED BY THE
STATE OF UTAH
AUG 17 1990

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WALTER F. WOLFINGER,)

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IN THE UTAH COURT OF APPEALS

In the Matter of the Estate of)
) Case No. 890323-CA
 WALTER F. WOLFINGER,)
) Priority No. 14b
 Deceased.)

BRIEF OF APPELLANT

JURISDICTION OF THE COURT OF APPEALS

This Court has appellate jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(h). The appeal was originally filed with the Utah Supreme Court, but was transferred to this Court on May 19, 1989.

NATURE OF THE PROCEEDINGS

This is an appeal of the trial court's Memorandum Decision and Judgment after a trial on stipulated facts. The trial court ruled that Appellant was not entitled to the proceeds of a \$30,000 promissory note which she claims she held jointly with the decedent.

STATEMENT OF THE ISSUES

1. Did the Issues set forth in the Pre-Trial Order prohibit the District Court from finding that a joint account was never created?

2. Did the decedent successfully terminate the joint account prior to his death?

3. Did the trial court err in awarding the joint account to the decedent's estate?

DETERMINATIVE CONSTITUTIONAL PROVISIONS,
STATUTES, ORDINANCES AND RULES

The following statutes are believed determinative and are set forth verbatim in the Addendum:

Utah Code Ann. § 75-6-101
Utah Code Ann. § 75-6-104
Utah Code Ann. § 75-6-105

Appellant does not rely on any constitutional provisions, ordinances or rules.

STATEMENT OF THE CASE

Susan Wolfinger a/k/a Susan Boyles ("Susan" or "Appellant") is the daughter of the decedent, Walter F. Wolfinger ("Walt"). Prior to Walt's death, he maintained several accounts with NEFCO Finance Company ("NEFCO"). The accounts were each evidenced by a promissory note and a ledger card. Walt died on December 6, 1984, and his Will was admitted to probate in this matter on January 2, 1985. Susan claimed ownership of two of the NEFCO notes as a joint owner, in the principal amounts of \$10,000 and \$30,000 respectively. On November 12, 1987, Judge Eves entered an Order And Judgment determining that Susan was entitled to the

\$10,000 note as a matter of law, but ruled that material issues of fact remained as to the \$30,000 note.

A final Pre-Trial Conference was held on December 6, 1988, and a stipulated Pre-Trial Order was executed by the Court on that date. The Pre-Trial Order contained only two issues:

(a) Can a joint tenant unilaterally destroy the joint tenancy by asking that the name of the other joint tenant be deleted from the appropriate documents?

(b) Can an inter vivos gift be unilaterally revoked by the donor once the gift has been completed?

On the date of the trial, counsel for the Estate filed a Memorandum which did not address the attempted destruction of the joint tenancy, but rather questioned its very creation.

The evidence was submitted on written stipulated facts, which are set forth herein and included in the Addendum.

1. The decedent, Walter F. Wolfinger (hereafter "Walt") is the father of Susan Wolfinger a/k/a Susan Boyles (hereafter "Susan").

2. On June 14, 1983, Walt transferred \$30,000 to NEFCO Finance Company (hereafter "NEFCO") in exchange for a \$30,000 interest bearing promissory note (hereafter "the Note") due "on demand 90 days--6 mos." A true and correct copy of the Note is attached hereto as Exhibit "A" and incorporated herein by reference.

3. The Note was one of several notes Walt had purchased from NEFCO, and was given the account number "6989" by NEFCO.

4. The Note was evidenced by a corresponding ledger card which was kept by NEFCO at all times relevant hereto. The ledger card depicts the purchase of the Note and payments of interest from NEFCO to Walt. A true and correct copy of the ledger card containing transactions through June 14, 1985 is attached hereto as Exhibit "B" and incorporated herein by reference.

5. The Note was presumably renewed every six months, both during Walt's life and after his death. Some of the renewal Notes have been located, and true and [correct] copies of those Notes are attached hereto as Exhibits "C", "D" and "E" and incorporated herein by reference. The following list of Notes is provided for the Court's convenience:

<u>DATE</u>	<u>PAYABLE TO</u>	<u>EXHIBIT</u>
Jun 14, 1983	Walt Wolfinger	A
Dec 14, 1983	not found	N/A
Jun 14, 1984	not found	N/A
Dec 14, 1984	not found	N/A
Jun 14, 1985	Walt Wolfinger	C
Dec 14, 1985	Walter Wolfinger Estate-- Susan Boyles	D
Jun 14, 1986	Walter Wolfinger Estate	E

6. At some time prior to his death, Walt instructed NEFCO to place Susan's name on the Note as a joint payee. Susan's name was hand-written on the ledger card by NEFCO's manager, Fred R. Green. Because certain of the renewal Notes have never been located (see Paragraph No. 5) the parties do not know whether or not Susan's name appeared on any of the missing Notes.

7. After Walt's original instruction to NEFCO, and prior to his death, he orally instructed Fred R. Green to remove Susan's name from the Note because of a tiff that had occurred between Walt and Susan.

8. Walt died on December 6, 1984. At the time of his death, Susan's name remained on the ledger card. Susan's name is not on the most recent Note.

9. At all times relevant hereto, NEFCO was registered with the Utah Department of Financial Institutions as a regulated lender.

In addition to the written stipulated facts, one additional fact was orally agreed upon at trial as follows:

[MR. HIGBEE:] Your Honor, one of the facts that we're going to supplement it with -- Mr. Park and I have talked about this outside of Your Honor's presence -- NEFCO Finance is in the business of financing purchases for Northeast Furniture Company of personal property.

They solicit funds from investors or depositors, so to speak, and they issue notes in exchange for those funds, and then they use those funds to loan for their financial operation.

MR. PARK: That's correct, as I understand.

THE COURT: Is that stipulated, Mr. Park?

MR. PARK: I'll accept the stipulation, yes, sir.

After argument, the Court took the matter under advisement, and on December 22, 1989, issued a Memorandum Decision determining that Walt had not created a joint account and Susan was therefore not entitled to the proceeds of the \$30,000 note. Susan challenged the ruling based on the limited issues as set forth in the Pre-Trial Order, but Judgment was entered in favor of Walt's Estate on February 17, 1989. Susan appealed.

SUMMARY OF THE ARGUMENT

The Pre-Trial Order, approved by both counsel and executed by the Court at the Pre-Trial Conference, contained only two issues, both dealing with the attempted destruction of an already existing joint asset. The Pre-Trial Order controlled the issues at trial, and the lower court therefore erred in ruling that Walt had not created a joint asset.

Once the joint account was created, Walt could only terminate it by written order to NEFCO during his lifetime, as provided by statute. His oral attempt to terminate the joint account was therefore invalid, and the proceeds of the \$30,000 note should have been awarded to Susan upon Walt's death.

ARGUMENT

POINT I

THIS COURT IS NOT REQUIRED TO GIVE ANY
DEFERENCE TO THE TRIAL COURT'S FINDINGS
BUT SHOULD EXAMINE THE FACTS DE NOVO

Because this matter was submitted to the trial court on stipulated facts, this Court need not give any deference to the trial court's findings. As stated in Sacramento Baseball Club, Inc. v. Great Northern Baseball Co., 748 P.2d 1058, 1060 (Utah 1987), "When a trial court relies on stipulated facts to decide a case, [the appellate court] does not apply the clearly erroneous standard, but will sustain the lower court's decision only if convinced of its correctness. Thus [the appellate court] examine[s] the facts de novo." Citations omitted.

POINT II

THE ISSUES SET FORTH IN THE PRE-TRIAL ORDER
PRECLUDE THE TRIAL COURT'S FINDING THAT A JOINT
ACCOUNT WAS NEVER CREATED

A pretrial order controls the issues of a case where it is made without objection and no motion is made to change it, unless it is modified at trial to prevent a manifest injustice. Citizens Casualty Co. of New York v. Hackett, 17 Utah 2d 304, 410 P.2d 767 (1966). In the present matter, the Pre-Trial Order contained only two issues, neither of which dealt with the creation of joint account. There was no objection to the Pre-Trial Order; in fact, it was approved by both counsel prior

to its execution by the trial court. There was no motion to change it, there was no introduction of additional evidence at the trial (except that regarding NEFCO's activities), and there was no "changed or newly discovered condition" which would justify the consideration of an issue not contained in it. See Kaiser Aluminum & Chemical Sales, Inc. v. Lords, 23 Utah 2d 152, 460 P.2d 321 (1969). Moreover, Kaiser states that the party attempting to introduce a new issue at trial must show that manifest injustice would occur if the issue were excluded. 460 P.2d at 323. Here, there was no attempt to make such a showing, and the trial court's decision should have been based solely on the legal effect of Walt's attempted destruction of an existing joint asset, rather than its creation.

POINT III

WALT FAILED TO TERMINATE THE JOINT ACCOUNT PRIOR TO HIS DEATH

As provided in Utah Code Ann. § 75-6-105, rights of survivorship in a joint account may only be changed by written order. The order must be signed by the party requesting the change, must be received by the financial institution during the party's lifetime, and must not be countermanded by a later written order of the same party during his lifetime. In the present matter, Walt orally instructed Mr. Green to remove Susan's name from the \$30,000 note. His attempt to terminate the

joint account was therefore ineffective, as the trial court correctly recognized on page 3 of its Memorandum Decision.

POINT IV

UPON WALT'S DEATH, THE NEFCO ACCOUNT BELONGED TO SUSAN

Under the Utah Uniform Probate Code, there are three types of multiple-party accounts: a joint account, a P.O.D. account, and a trust account. Utah Code Ann. § 75-6-101(5). Appellant submits that the NEFCO account is either a joint account (as defined in Utah Code Ann. § 75-6-101(4)) or a P.O.D. account (as defined in Utah Code Ann. § 75-6-101(10)).

The disposition of the NEFCO funds upon Walt's death are clearly and unequivocally set out in Utah Code Ann. § 75-6-104, as follows:

(1) Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account is created.

* * * *

(2) If the account is a P.O.D. account . . . (b) On death of the sole original payee or of the survivor of two or more original payees, any sums remaining on deposit belong to the P.O.D. payee

If the NEFCO account is considered a "joint account", the statute requires Walt's Estate to show by clear and convincing evidence that Walt did not intend Susan to receive the proceeds of the account upon his death at the time he created the account. The same rule hold true under law:

If the contract between the parties ostensibly creates a joint tenancy relationship with full right of survivorship, there arises a presumption that such is the case unless and until some interested party shows under equitable rules that the contract should be reformed to show some other agreement of the parties or that the contract is not enforceable because of fraud, mistake, incapacity, or other infirmity.

Continental Bank And Trust Company v. Kimball, 21 Utah 2d 152, 442 P.2d 472, 474 (1968); Hobbs v. Fenton, 25 Utah 2d 206, 479 P.2d 472 (1971); McCullough v. Wasserback, 30 Utah 2d 398, 518 P.2d 691 (1974). The presumption can only be overcome by clear and convincing evidence. McCullough at 693.

In the present situation, there is no evidence that the joint note was created for any reason other than survivorship passage to Susan. The funds held by NEFCO were but a small portion of Walt's assets and were not readily liquid. The only possible intent is that provided by the presumption--that Walt wanted the principal amount of the note to pass to Susan at the time of his death.

If the NEFCO account is considered a "P.O.D. account", the disposition of the proceeds are governed by the cited statute. No matter which type of multiple-party account this is, Susan is entitled to the proceeds.

CONCLUSION

Appellant requests that the trial court's Judgment be reversed and that the proceeds of the NEFCO account be awarded to

Susan, together with interest thereon from the date of Walt's death and costs of court including costs of this appeal.

RESPECTFULLY SUBMITTED this the 21st day of July, 1989.

CHAMBERLAIN & HIGBEE



COLIN R. WINCHESTER
Attorneys for Appellants

CERTIFICATE OF HAND-DELIVERY

I CERTIFY that on the 21st day of July, 1989, I hand delivered four (4) true and correct copies of the foregoing BRIEF OF APPELLANT to Michael W. Park, Esq., 110 North Main Street, Suite H, Cedar City, Utah 84720.



Colin R. Winchester

ADDENDUM

75-6-101. Definitions.

As used in this part:

(1) "Account" means a contract of deposit of funds between a depositor and a financial institution and includes a checking account, savings account, certificate of deposit, share account, and other like arrangement.

(2) "Beneficiary" means a person named in a trust account as one for whom a party to the account is named as trustee.

(3) "Financial institution" means any organization authorized to do business under state or federal laws relating to financial institutions, including, without limitation, banks and trust companies, industrial loan corporations with thrift certificate authorization, savings banks, building and loan associations, savings and loan companies or associations, and credit unions.

(4) "Joint account" means an account payable on request to one or more of two or more parties whether or not mention is made of any right of survivorship.

(5) "Multiple-party account" means any of the following types of account: (a) a joint account; (b) a P.O.D. account; or (c) a trust account. It does not include accounts established for deposit of funds of a partnership, joint venture, or other association for business purposes, or accounts controlled by one or more persons as the duly authorized agent or trustee for a corporation, unincorporated association, charitable or civic organization, or a regular fiduciary or trust account where the relationship is established other than by deposit agreement.

(6) "Net contribution" of a party to a joint account as of any given time is the sum of all deposits to it made by or for him, less all withdrawals made by or for him which have not been paid to or applied to the use of any other party, plus a prorata share of any interest or dividends included in the current balance. The term includes, in addition, any proceeds of deposit life insurance added to the account by reason of the death of the party whose net contribution is in question.

(7) "Party" means a person, including a minor, who, by the terms of the account, has a present right, subject to request, to payment from a multiple-party account. A P.O.D. payee or beneficiary of a trust account is a party only after the account becomes payable to him by reason of his surviving the original payee or trustee and includes a guardian, conservator, personal representative, or assignee, including an attaching creditor, of a party. It also includes a person identified as a trustee of an account for another whether or not a beneficiary is named, but it does not include any named beneficiary unless he has a present right of withdrawal.

(8) "Payment" of sums on deposit includes withdrawal, payment on check or other directive of a party, and any pledge of sums on deposit by a party and any setoff, reduction, or other disposition of all or part of an account pursuant to a pledge.

(9) "Proof of death" includes a death certificate or record or report which is prima facie proof of death under Section 75-1-107.

(10) "P.O.D. account" means an account payable on request to one person during lifetime and on his death to one or more P.O.D. payees, or to one or more persons during their lifetimes and on the death of all of them to one or more P.O.D. payees.

(11) "P.O.D. payee" means a person designated on a P.O.D. account as one to whom the account is payable on request after the death of one or more persons.

(12) "Request" means a proper request for withdrawal, or a check or order for payment, which complies with all conditions of the account, including special requirements concerning necessary signatures and regulations of the financial institution; but if the financial institution conditions withdrawal or payment on advance notice, for purposes of this part the request for withdrawal or payment is treated as immediately effective and a notice of intent to withdraw is treated as a request for withdrawal.

(13) "Sums on deposit" means the balance payable on a multiple-party account, including interest, dividends, and in addition any deposit life insurance proceeds added to the account by reason of the death of a party.

(14) "Trust account" means an account in the name of one or more parties as trustee for one or more beneficiaries where the relationship is established by the form of the account and the deposit agreement with the financial institution and there is no subject of the trust other than the sums on deposit in the account; and it is not essential that payment to the beneficiary be mentioned in the deposit agreement. A trust account does not include a regular trust account under a testamentary trust or a trust agreement which has significance apart from the account, or a fiduciary account arising from a fiduciary relation such as attorney-client.

(15) "Withdrawal" includes payment to a third person pursuant to check or other directive of a party.

75-6-104. Right of survivorship.

(1) Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account is created. If there are two or more surviving parties, their respective ownerships during lifetime shall be in proportion to their previous ownership interests under Section 75-6-103 augmented by an equal share for each survivor of any interest the decedent may have owned in the account immediately before his death; and the right of survivorship continues between the surviving parties.

(2) If the account is a P.O.D. account:

(a) On death of one of two or more original payees the rights to any sums remaining on deposit are governed by Subsection (1);

(b) On death of the sole original payee or of the survivor of two or more original payees, any sums remaining on deposit belong to the P.O.D. payee or payees if surviving, or to the survivor of them if one or more die before the original payee; if two or more P.O.D. payees survive, there is no right of survivorship in event of death of a P.O.D. payee thereafter unless the terms of the account or deposit agreement expressly provide for survivorship between them.

(3) If the account is a trust account:

(a) On death of one of two or more trustees, the rights to any sums remaining on deposit are governed by Subsection (1);

(b) On death of the sole trustee or the survivor of two or more trustees, any sums remaining on deposit belong to the person or persons named as beneficiaries, if surviving, or to the survivor of them if one or more die before the trustee, unless there is clear evidence of a contrary intent; and if two or more beneficiaries survive, there is no right of survivorship in event of death of any beneficiary thereafter unless the terms of the account or deposit agreement expressly provide for survivorship between them.

(4) In other cases, the death of any party to a multiple-party account has no effect on beneficial ownership of the account other than to transfer the rights of the decedent as part of his estate.

(5) A right of survivorship arising from the express terms of the account or under this section, a beneficiary designation in a trust account, or a P.O.D. payee designation, cannot be changed by will. 1977

75-6-105. Effect of written notice to financial institution.

The provisions of Section 75-6-104 as to rights of survivorship are determined by the form of the account at the death of a party. This form may be altered by written order given by a party to the financial institution to change the form of the account or to stop or vary payment under the terms of the account. The order or request must be signed by a party, received by the financial institution during the party's lifetime, and not countermanded by other written order of the same party during his lifetime. **1975**

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CLERK

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IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR
IRON COUNTY, STATE OF UTAH

In the Matter of the Estate of) PRE-TRIAL ORDER
WALTER F. WOLFINGER,)
Deceased.) Probate No. 3416
Judge J. Philip Eves

The above-referenced matter came before the Court on Tuesday, December 6, 1988, at 9:00 a.m., for a Pre-Trial Conference and Settlement Conference. Michael W. Park appeared on behalf of the Estate, and Colin R. Winchester and Thomas M. Higbee appeared on behalf of Susan Wolfinger.

1. JURISDICTION. Jurisdiction is properly invoked pursuant to Utah Code Annot. Section 75-1-302(a). The jurisdiction of the Court is not disputed and is hereby determined to be present.

2. VENUE. Venue is properly laid in Iron County, State of Utah, because the decedent was domiciled in Iron County at the time of his death.

3. GENERAL NATURE OF THE CLAIMS OF THE PARTIES.

(a) Susan Wolfinger's claims: That she is entitled to the proceeds of a certain \$30,000 note

1 purchased by the decedent prior to his death from
2 NEFCO Finance Company (hereafter "NEFCO") as the
3 surviving joint tenant of said note. Ms. Wolfinger
4 further claims that she is entitled to all interest
5 accruing on said note from the date of the decedent's
6 death.

7 (b) Estate claims: That the Estate is entitled to
8 the note, including interest, referred to in
9 subparagraph (a).

10 4. GENERAL FACTS. The following facts are anticipated to
11 be shown at trial, and are based on depositions taken and
12 documentation available:

13 (a) On June 14, 1983, the decedent purchased a
14 note from NEFCO in the principal sum of \$30,000.

15 (b) Sometime prior to the decedent's death, he
16 requested NEFCO's manager, Fred R. Green, to place
17 Susan Wolfinger's name (then Susan Boyles) on the note
18 as a joint payee.

19 (c) Pursuant to the decedent's request, Mr. Green
20 placed Susan's name on the ledger card for the note.

21 (d) The note was renewed, presumably every six
22 months, from the date of purchase to the present.

23 (e) Sometime after the decedent requested that
24 Susan Wolfinger's name be placed on the note, he ~~either~~ *aw*
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requested
W ~~requested~~ that her name be taken off the note, ~~or~~
~~failed to instruct Mr. Green to leave her name on the~~
~~note~~

(f) When the note was renewed on December 14, 1985, it was made payable to the order of "Walter Wolfinger Estate--Susan Boyles". This renewal was made approximately one year after the death of the decedent.

(g) The note currently is made payable to the order of "Walter Wolfinger Estate".

5. ISSUES OF LAW. The following issues will be briefed by the parties and submitted to the Court:

(a) Can a joint tenant unilaterally destroy the joint tenancy by asking that the name of the other joint tenant be deleted from the appropriate documents?

(b) Can an inter vivos gift be unilaterally revoked by the donor once the gift has been completed?

6. EXHIBITS. The following exhibits will be introduced at trial. All such exhibits will be exchanged by the parties prior to trial: ledger cards and notes relating to the \$30,000 note purchased by the decedent.

The above listed exhibits have not been received, but shall be presented to, and marked for identification by, the Clerk of the Court prior to trial. The authenticity of the foregoing exhibits has been stipulated, but they have been received subject

1 to objections, if any, by the opposing party at the time of trial
2 as to their relevancy and materiality.

3
4 7. WITNESSES. In the absence of reasonable notice to
5 opposing counsel to the contrary, Susan Wolfinger will call as
6 witnesses: Fred R. Green and Susan Wolfinger a/k/a Susan Boyles.
7 In the absence of reasonable notice of opposing counsel to the
8 contrary, the Estate will call as witnesses: *Claude Slack.*
9 *aw*

10 In the event that other witnesses are to be called at trial,
11 a statement of their names and addresses, and the general subject
12 matter of their testimony, will be served upon opposing counsel
13 and filed with the Court at least five (5) days prior to trial.
14 This restriction shall not apply to rebuttal witnesses, the
15 necessity of whose testimony cannot reasonably be anticipated
16 before the time of trial.

17 8. AMENDMENTS TO PLEADINGS. There are no requests to amend
18 the pleadings.

19 9. DISCOVERY. Discovery has been completed.

20 10. TRIAL SETTING. This matter is set for 1 day non-jury
21 trial on Tuesday, December 20, 1988, at 1:30 p.m.

22 11. SETTLEMENT. Counsel has conferred respecting the
23 settlement of this matter and consider the possibility of
24 settlement to be fair. Trial will not be postponed to allow the
25 conduct of further settlement negotiations except on a showing of
good cause.


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DATED this 6th day of December, 1988.

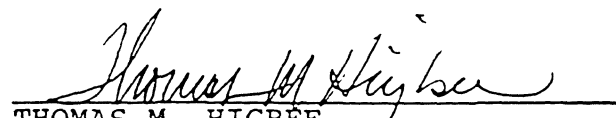
BY THE COURT:


JUDGE J. PHILIP EVES

APPROVED BY:


MICHAEL W. PARK
Attorney for Estate

APPROVED BY:


THOMAS M. HIGBEE
Attorney for Susan Wolfinger

FILED

DEC 20 1988

CLERK

Cecilia A. Johnson DEPUTY

THOMAS M. HIGBEE [1484]
COLIN R. WINCHESTER [4696]
CHAMBERLAIN & HIGBEE
Attorneys for Susan Wolfinger
250 South Main Street
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Cedar City, Utah 84720
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IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR
IRON COUNTY, STATE OF UTAH

In the Matter of the Estate of)	STIPULATED FACTS
)	
WALTER F. WOLFINGER,)	
)	Probate No. 3416
Deceased.)	Judge J. Philip Eves

COME NOW the parties hereto, by and through their counsel of record, and stipulate to the following facts in lieu of testimony that would otherwise be presented at trial:

1. The decedent, Walter F. Wolfinger (hereafter "Walt") is the father of Susan Wolfinger a/k/a Susan Boyles (hereafter "Susan").

2. On June 14, 1983, Walt transferred \$30,000 to NEFCO Finance Company (hereafter "NEFCO") in exchange for a \$30,000 interest bearing promissory note (hereafter "the Note") due "on demand 90 days--6mos." A true and correct copy of the Note is attached hereto as Exhibit "A" and incorporated herein by reference.

3. The Note was one of several notes Walt had purchased from NEFCO, and was given the account number "6989" by NEFCO.

1
2 4. The Note was evidenced by a corresponding ledger card
3 which was kept by NEFCO at all times relevant hereto. The ledger
4 card depicts the purchase of the Note and payments of interest
5 from NEFCO to Walt. A true and correct copy of the ledger card
6 containing transactions through June 14, 1985 is attached hereto
7 as Exhibit "B" and incorporated herein by reference.

8 5. The Note was presumably renewed every six months, both
9 during Walt's life and after his death. Some of the renewal
10 Notes have been located, and true and copies of those Notes are
11 attached hereto as Exhibits "C", "D" and "E" and incorporated
12 herein by reference. The following list of Notes is provided for
13 the Court's convenience:

<u>DATE</u>	<u>PAYABLE TO</u>	<u>EXHIBIT</u>
Jun 14, 1983	Walt Wolfinger	A
Dec 14, 1983	not found	N/A
Jun 14, 1984	not found	N/A
Dec 14, 1984	not found	N/A
Jun 14, 1985	Walt Wolfinger	C
Dec 14, 1985	Walter Wolfinger Estate-- Susan Boyles	D
Jun 14, 1986	Walter Wolfinger Estate	E

19 6. At some time prior to his death, Walt instructed NEFCO
20 to place Susan's name on the Note as a joint payee. Susan's name
21 was hand-written on the ledger card by NEFCO's manager, Fred R.
22 Green. Because certain of the renewal Notes have never been
23 located (see Paragraph No. 5) the parties do not know whether or
24 not Susan's name appeared on any of the missing Notes.

25 7. After Walt's original instruction to NEFCO, and prior to
his death, he orally instructed Fred R. Green to remove Susan's

1 name from the Note because of a tiff that had occurred between
2 Walt and Susan.

3 8. Walt died on December 6, 1984. At the time of his
4 death, Susan's name remained on the ledger card. Susan's name is
5 not on the most recent Note.

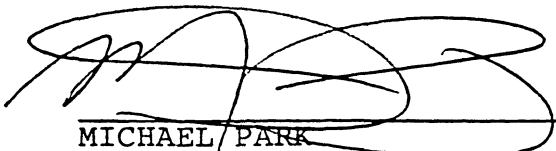
6 9. At all times relevant hereto, NEFCO was registered with
7 the Utah Department of Financial Institutions as a regulated
8 lender.

9 DATED this 19th day of December, 1988.

10 CHAMBERLAIN & HIGBEE

11 *Colin Winchester*

12 COLIN R. WINCHESTER
13 Attorney for Susan Wolfinger

14 
15 MICHAEL PARK
16 Attorney for the Estate

0133

EXHIBIT A

10/83
\$30,000.00
Cedar City, Utah June 14, 1983
after date, for value received, I, we, or either of us
promise to pay to the order of Walt Wolfinger
the sum of Thirty thousand and no/100 DOLLARS
negotiable and payable at 920 No. Main--Cedar City, Utah
in legal tender of the United States of America, with interest at the rate of 12.08 per cent per annum
from date until maturity, and at the rate of 10 per cent per annum after maturity until paid; and if this note
be placed in the hands of an attorney for collection, I, we, or either of us promise to pay a reasonable attor-
ney's fee. The makers, sureties, guarantors and endorsers hereof severally waive presentment for payment,
protest, notice of protest and on non-payment of this note. If the interest on this note is not paid promptly
at the time it becomes due, the holder of this note may, at his option, declare the principal immediately due
and payable.
P.O. Address
Due on demand 90 days
6 mos.

NEPCO
WITNESS: G. H. [Signature]

~~N~~ (T.N.).

6989

S.M.

REMARKS

MONTHS

DATE OF

SERVICE

0234

1950

14-69889

\$30,000.00

Cedar City, Utah June 14, 1985, 19

after date, for value received, I, we, or either of us
promise to pay to the order of ***Walt Wolfinger***

the sum of **Thirty thousand and no/100***** DOLLARS
negotiable and payable at 920 No. Main Cedar City, Ut

for 6 mos.
In legal tender of the United States of America, with interest at the rate of *9.60%/ per cent per annum
from date until maturity, and at a rate of 10 per cent per annum after maturity until paid, and if this note
be placed in the hands of an attorney for collection, I, we, or either of us promise to pay a reasonable attor-
ney's fee. The makers, sureties, guarantors and endorsers hereof severally waive presentment for payment,
protest, notice of protest and on non-payment of this note. If the interest on this note is not paid promptly
at the time it becomes due, the holder of this note may, at his option, declare the principle immediately due
and payable.

P. O. Address

NEFCO: [Signature]

Due on demand 90 days

WITNESS: [Signature]

9135

EXHIBIT C

0136

6989

\$30,000.00

Cedar City, Utah Dec, 14- 1985, 19

.....after date, for value received, I, we, or either of us
 promise to pay to the order of Walter Wolfinger Estate--Susan Boyles

the sum of Thirty thousand and no/100***** DOLLARS
 negotiable and payable at 920 No. Main Cedar City, Ut

In legal tender of the United States of America, with interest at the rate of **9.51%** per cent per annum from date until maturity, and at a rate of 10 per cent per annum after maturity until paid, and if this note be placed in the hands of an attorney for collection, I, we, or either of us promise to pay a reasonable attorney's fee. The makers, sureties, guarantors and endorsers hereof severally waive presentment for payment, protest, notice of protest and on non-payment of this note. If the interest on this note is not paid promptly at the time it becomes due, the holder of this note may, at his option, declare the principle immediately due and payable.

P. O. Address.....

NEFCO:.....

Due 90 days on demandWitness: Geth B. Smith

To replace all previous notes #14-6989

0137

EXHIBIT E

\$ 30,000.00 6 mos. note Cedar City, Utah June 14, 1986, 19.....

.....after date, for value received, I, we, or either of us
promise to pay to the order of Walter Wolfinger Estate *****

the sum of Thirty thousand and no/100***** DOLLARS
negotiable and payable at 920 N. Main Cedar City, Utah

in legal tender of the United States of America, with interest at the rate of *8.64%* per cent per annum
from date until maturity, and at a rate of 10 per cent per annum after maturity until paid, and if this note
be placed in the hands of an attorney for collection, I, we, or either of us promise to pay a reasonable attor-
ney's fee. The makers, sureties, guarantors and endorsers hereof severally waive presentment for payment,
protest, notice of protest and on non-payment of this note. If the interest on this note is not paid promptly
at the time it becomes due, the holder of this note may, at his option, declare the principle immediately due
and payable.

P. O. Address.....

NEFCO: BH Hunter

Due 90 days on demand

Witness: Setty B Hunter

~~This is to replace all previous notes~~
~~#14-6989~~

1 IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
2 IN AND FOR THE COUNTY OF IRON, STATE OF UTAH

3 HON. J. PHILIP EVES, Judge
4

5
6 IN THE MATTER OF THE ESTATE)
7 OF WALTER F. WOLFINGER,)
8 Deceased.) Probate No. 3416
9)
10

11 REPORTER'S HEARING TRANSCRIPT
12 (Partial Transcript Only)

13 Tuesday, December 20, 1988
14

15 APPEARANCES OF COUNSEL:

16 For The Estate: MICHAEL W. PARK, ESQ.
17 110 North Main Street
18 Suite H
19 Cedar City, Utah 84720

20 For Susan Wolfinger: CHAMBERLAIN & HIGBEE
21 BY: THOMAS M. HIGBEE, ESQ.
22 250 South Main Street
23 Cedar City, Utah 84720
24
25

Reported By: PAUL G. MCMULLIN, CSR, RPR

PAUL G. MCMULLIN

1 PAROWAN, UTAH; TUESDAY, DECEMBER 20, 1988

2 -oOo-

3 THE COURT: Yes. Let's do it that way, since
4 you're on your feet.

5 MR. HIGBEE: Thank you, Your Honor. This is a --
6 let me just set out the basic facts.

7 The facts are stipulated to. And Mr. Park
8 and I have -- I think we'd be perfectly willing to
9 supplement the stipulated facts, if Your Honor has any
10 questions as we go along.

11 The petitioner in this case is Susan
12 Wolfinger. She's the daughter of Walter F. Wolfinger,
13 who died in 1984. The issue before the Court at this
14 time is the effect of a promissory note that was executed
15 by NEFCO Finance to Walter Wolfinger.

16 Your Honor, one of the facts that we're
17 going to supplement it with -- Mr. Park and I have talked
18 about this outside of Your Honor's presence -- NEFCO
19 Finance is in the business of financing purchases for
20 Northeast Furniture Company of personal property. They
21 solicit funds from investors or depositors, so to speak,
22 and they issue notes in exchange for those funds, and then
23 they use those funds to loan for their financial operation.

24 MR. PARK: That's correct, as I understand.

25 THE COURT: Is that stipulated, Mr. Park?

1 MR. PARK: I'll accept the stipulation, yes, sir.

2 * * *

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C E R T I F I C A T E

STATE OF UTAH)
COUNTY OF WASHINGTON) ss.

I, PAUL G. MCMULLIN, CSR, RPR, a Notary
Public, in and for the County of Washington, State of
Utah, do hereby certify:

That, the foregoing matter, to wit, IN THE MATTER
OF THE ESTATE OF WALTER F. WOLFINGER, was taken down
by me in shorthand at the time and place therein named
and thereafter reduced to computerized transcription
under my direction.

I further testify that I am not a party to the
action, nor am I interested in the event of the action.

WITNESS my hand and seal this 2nd day of February,
1989.



PAUL G. MCMULLIN, CSR, RPR

RESIDING AT: ST. GEORGE, UTAH

MY COMMISSION EXPIRES: 6-17-91

FIFTH JUDICIAL DIST COURT
IRON COUNTY
FILED
DEC 27 1988

Cecilia A. Johnson CLERK
DEPUTY

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
IN AND FOR IRON COUNTY, STATE OF UTAH

IN THE MATTER OF THE ESTATE)	
OF)	MEMORANDUM
WALTER F. WOLFINGER,)	DECISION
Deceased.)	Probate No. 3416

This matter came on for trial by the Court on December 20, 1988. The Estate was represented by Michael W. Park, its attorney, and the Petitioner Susan L. Boyles was present with her attorneys Thomas M. Higbee and Colin R. Winchester.

The matter came on for trial on the claims of Petitioner Boyles (hereinafter "Boyles") relating to the question of whether Boyles or the estate is entitled to the proceeds of that certain Note, account 6989, in an original amount of \$30,000.00 payable by NEFCO.

The matter was submitted to the Court on stipulated facts filed December 20, 1988, with attached exhibits. Each side filed Memoranda of Points and Authorities and oral argument was had. The Court took the matter under submission for further review.

THE APPLICABLE LAW

The first issue presented is whether the applicable law is common law and case law or the provisions of the Uniform Probate Code, 75-6-101 et seq. U.C.A. Because of the basis of my decision as set out hereinafter, I believe the result would be the same under either body of law but for purposes of this decision I will analyze the case under the Uniform Probate Code.

FACTS

The Stipulated Facts recite that on June 14, 1983, Mr. Wolfinger deposited \$30,000.00 with NEFCO and took back a note due "on demand 90 days - 6 months". That note was payable to Mr. Wolfinger only.

Thereafter the note was apparently renewed, with a new note being issued at each renewal, every 6 months. The parties were able to locate the original note of June 14, 1983, but could not find and did not submit the notes for December 14, 1983; June 14, 1984 and December 14, 1984. The note for June 14, 1985 was submitted and was payable only to Mr. Wolfinger.

Mr. Wolfinger died on December 6, 1984. Sometime prior to his death Mr. Wolfinger orally instructed NEFCO to place Boyles' named "on the Note as joint payee". Mr. Fred R. Green hand wrote

Boyles' name on the account ledger card where it remained. Thereafter, and prior to his death, Mr. Wolfinger instructed Mr. Green to remove Susan's name "from the note". The dates of these requests are not known and it is not known whether Boyles' name was ever actually added to any Note prior to the death of Mr. Wolfinger.

LEGAL ANALYSIS

75-6-101(1) defines an account as a contract of deposit of funds between a depositor and a financial institution. Clearly Mr. Wolfinger did create an account by depositing his funds with NEFCO and by receiving a note from NEFCO evidencing that deposit and the terms for repayment.

75-6-101(4) defines a joint account as an account payable on request to one or more of two or more parties. The question presented is whether Mr. Wolfinger ever created a joint account by contract with the financial institution.

Clearly, if Mr. Wolfinger's instructions had been followed and a note had been issued bearing both his and Boyles' names as payees, then a joint account would have been created. If Wolfinger had then died during the term of that joint account, the sums remaining on deposit would have passed to Boyles under 75-6-104(1) U.C.A. Any attempt by Wolfinger to alter the note during its term and during his lifetime would have required a written instruction under 75-6-105 U.C.A.

However, no evidence has been presented that any note was ever issued during Wolfinger's lifetime with Boyles' name as co-payee. The Court cannot determine whether the instruction to add Boyles' name was rescinded prior to the renewal of the note immediately upcoming. Petitioner has the burden of showing, not only that Wolfinger intended at one time to create a joint account in the future but that by contract with the financial institution he did create such an account. Petitioner has failed to produce any evidence that Boyles' name was added to any note prior to the rescinding of the instruction or prior to Wolfinger's death.


The notes produced, including the note issued ^{6 months} ~~only 8 days~~ after Wolfinger died, were in his name alone and there is no evidence upon which to base an assumption that any of the notes not found bore Boyles' name. 9

ADDING BOYLES' NAME TO THE LEDGER

An account is created by contract between the depositor and the financial institution. Wolfinger's specific instruction to Green was to add Boyles' name to the note, not the ledger card. Adding Boyles' name to the ledger card would not create a joint account where such an action was not contemplated by the depositor and where he may not even have known that the action had been taken by Mr. Green.

Therefore, the Court finds that Petitioner has failed to establish that any joint account was ever created. Further, the Court finds that the notation on the ledger of Boyles' name did not create a contract and was no evidence of an oral contract since it was contrary to the oral instructions given by Mr. Wolfinger. At the time of Wolfinger's death, the NEFCO account #6989 was his alone and the sums on deposit therein are found to be assets of the Wolfinger Estate.

DATED this 22nd day of December, 1988.


J. PHILIP EVES
Fifth District Judge

MAILING CERTIFICATE

I hereby certify that on this 22nd day of December, 1988, a true and correct copy of the above and foregoing was mailed, first class postage prepaid, or hand delivered to:

Michael W. Park, Esq.
P. O. Box 765
Cedar City, UT 84720

Thomas M. Higbee, Esq.
Colin R. Winchester, Esq.
P. O. Box 726
Cedar City, UT 84720

Carolyn Smitherman

MICHAEL W. PARK (2516)
Attorney At Law
110 North Main Street, Suite H
P.O. Box 765
Cedar City, UT 84720
Telephone: (801) 586-6532

FIFTH JUDICIAL DIST COURT
IRON COUNTY
FILED

FEB 17 1989

CLERK

Morgan Munger DEPUTY

IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR
IRON COUNTY, STATE OF UTAH

In the Matter of the Estate of)	FINDINGS OF FACT
)	CONCLUSIONS OF LAW
WALTER F. WOLFINGER,)	
)	
Deceased.)	Probate No. 3416

The above entitled matter came on regularly for trial on December 20, 1988 and the Estate was represented by its attorney, Michael W. Park and the Petitioner, Susan L. Boyles was present and represented by her attorneys, Thomas M. Higbee and Colin R. Winchester and the Court having reviewed the stipulated facts and having heard the arguments of Counsel now makes its Findings of Fact and Conclusions of Law:

1. The Court finds the facts as stipulated by the parties.
2. The Court finds that there was no evidence presented that a promissory note was issued during Mr. Wolfinger's lifetime with Susan Boyles name as co-payee.
3. The Court finds that the Petitioner has the burden of showing that Wolfinger intended to create a joint account and that he did create such an account.
4. The Court finds that Petitioner failed to produce any evidence that Susan Boyles name was added to a note prior to the time that Mr. Wolfinger gave the instruction to remove

petitioners name from the promissory note.

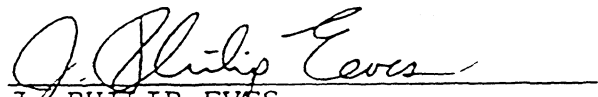
5. The Court finds that the notes produced, including the note issued only six (6) months after Mr. Wolfinger died, were in his name alone. There is no evidence that any of the notes not found bore the name of Petitioner, Susan Boyles.

6. The Court finds that the notation of the name of Petitioner, Susan Boyles, on the ledger card did not create a contract and that the NEFCO account No. 6989 was in Mr. Wolfinger's name alone at the time of his death.

CONCLUSIONS OF LAW

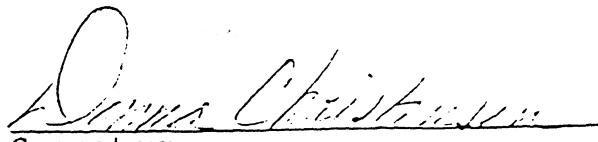
From the foregoing findings of fact, the Court concludes that the Petitioner failed to establish a joint account and that said promissory note is an asset of the Wolfinger Estate and Petitioner, Susan Boyles, is not entitled to have the proceeds from said note delivered to her.

DATED this 9th day of February, 1989.


J. PHILIP EVES
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I do hereby certify that on the 1st day of February, 1989, a true and correct copy of the foregoing was mailed, first class, postage prepaid to Thomas M. Higbee, CHAMBERLAIN & HIGBEE, P.O. Box 726, Cedar City, UT 84720.


Secretary

MICHAEL W. PARK (2516)
Attorney At Law
P.O. Box 765
Cedar City, UT 84720
Telephone: (801) 586-6532

FIFTH JUDICIAL DIST COURT
IRON COUNTY
FILED
FEB 17 1989

CLERK
Maxine Mussen DEPUTY

IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR
IRON COUNTY, STATE OF UTAH

In the Matter of the Estate of)	
)	JUDGMENT
WALTER F. WOLFINGER,)	
)	
Deceased.)	Probate No. 3416

The above entitled matter came on regularly for trial before the Court on December 20, 1988 and the Estate was represented by its attorney, Michael W. Park and the Petitioner, Susan L. Boyles was present and represented by her attorney, Thomas M. Higbee and Colin R. Winchester and the Court having reviewed the Stipulated Facts and having heard the arguments of Counsel and having read the Memorandum and cases submitted by the parties and having made its Findings of Fact and Conclusions of Law, hereby makes the following judgment:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Petition of Susan Boyles is hereby denied and the \$30,000.00 promissory note made payable to Walter F. Wolfinger by Nefco Finance is ordered to be part of the estate and held by the Trustee of the Estate, Claude Slack.

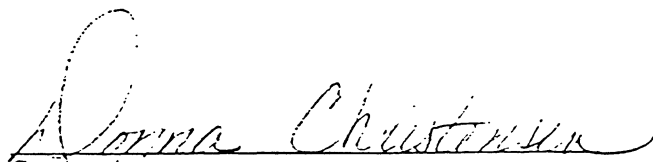
DATED this 9th day of February, 1989. *JPE*

Philip Eves

PHILIP EVES
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I do hereby certify that on the 5th day of January, 1989,
a true and correct copy of the foregoing was mailed, first class,
postage prepaid to Thomas M. Higbee, CHAMBERLAIN & HIGBEE, P.O.
Box 726, Cedar City, UT 84720.


Secretary